BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY L. CHERRY	)	
Claimant	)	
	)	
VS.	)	Docket No. 236,102
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed Administrative Law Judge Brad E. Avery's Award dated March 4, 2002. The Board heard oral argument on December 4, 2002. The Director of the Division of Workers Compensation appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. By Agreed Order, the record also includes the medical records of Dr. J. Mark Melhorn.

ISSUES

The Administrative Law Judge (ALJ) determined claimant was terminated for providing a false reason for absence from work. Because claimant was terminated for misconduct, the ALJ imputed the wage he was earning and would have continued to earn had he continued working for respondent. As this was at least 90 percent of his average weekly wage, his permanent partial general disability award was limited to his 6 percent functional impairment. The ALJ adopted the respondent's calculations and determined claimant's gross average weekly wage was $410.17.

The claimant contends he was terminated for excessive absences rather than falsifying the reason for an absence. The claimant argues that because some of the absences counted against him were for periods of time he was receiving treatment for his work-related injury, the termination was improper and not for good cause. Consequently, claimant argues he is entitled to a work disability. Claimant further argues his gross average weekly wage should be based upon exhibits he proffered at the regular hearing instead of those provided by the respondent.

Respondent notes it has a policy against falsification of reasons for absences from work and the penalty is immediate discharge. Respondent argues claimant gave a false reason for missing work and that is the reason his employment was terminated. Respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed that as a result of his repetitive work activities for respondent the claimant developed bilateral carpal tunnel syndrome. Ultimately, the claimant underwent surgical carpal tunnel releases to both upper extremities. The surgery on the right wrist was performed by Dr. J. Mark Melhorn on June 22, 1998, and the surgery on the left wrist was performed on July 6, 1998. After the surgeries claimant was first released to light-duty work and then returned to his regular job without restrictions.

Claimant continued working for respondent until his employment was terminated. Claimant repeatedly testified that he could not recall when or why he was terminated nor could he recall falsifying the reason he failed to report to work on November 25, 1998. The only thing claimant could remember was that he was advised to go talk to someone in personnel. He could only recall being told that he was terminated.

Dennis W. Lineberger, respondent's assistant personnel manager, testified that claimant was scheduled to work on November 25, 1998, but failed to report to work. On November 25, 1998, claimant called in late and left a recorded message for his immediate supervisor that he had been in a car wreck, had gone to the hospital and was at home.

Respondent's employees are assessed a point for every excused absence from work and three points for an unexcused absence. If an employee accumulates a total of 14 or more they are subject to termination. An employee is to call and notify respondent at least 30 minutes before the start of their shift to qualify for an excused absence.

Claimant's supervisor did not get the message and when claimant arrived at work on November 27, 1998, his supervisor directed him to the personnel office and claimant

was notified that he was being terminated for excessive absenteeism. The claimant's absence from work on November 25, 1998, was deemed unexcused because he failed to notify respondent he would be absent. Claimant was assessed three points and this raised his cumulative point total to 15 which subjected him to termination. But claimant argued that he had called in to report his absence. Because of the confusion regarding whether claimant had called in as well as the nature of his excuse for missing work on November 25, 1998, Mr. Lineberger testified that claimant was reinstated pending production of documentation to support his excuse that he had been in a car accident on that date.[1]

Mr. Lineberger further testified that respondent has a policy that falsification of reasons for absence is considered gross misconduct and subjects the employee to immediate discharge.

Claimant then met with Mr. Lineberger on November 30, 1998, to further discuss his absence from work on November 25, 1998, and claimant admitted that he had not been in a car accident on that date. Claimant did not know why he made up the excuse other than he was upset about his impending divorce. Claimant was then told that he was terminated due to falsification of the reason for his absence from work. Claimant filled out an exit interview questionnaire on December 10, 1998, on which he indicated that he was terminated for violation of company policy.[2]

Despite Mr. Lineberger's testimony the claimant continues to argue he was terminated for excessive absences and consequently he contends his termination was not in good faith because some of the absences used to reach the excessive cumulative total included time off for medical treatment due to his work-related injury. In support of this argument is the *Niesz*[3] case. In that case the Court found that where a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. "Once an accommodated job ends, the presumption of no work disability may be rebutted."[4]

The Board agrees that the test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant

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[1] Lineberger Depo. at 36.

[2] Lineberger Depo., Ex. 5.

[3] *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

[4] Id. at Syl. ¶ 2.

and respondent.[5] In this case, claimant was terminated for violating respondent's policy regarding falsification of the reason for an absence. Although claimant disputes that was the reason for his termination, nonetheless, Mr. Lineberger's uncontradicted testimony establishes that ultimately claimant was terminated for misconduct and not excessive absences. Moreover, claimant filled out an exit interview questionnaire on which he noted he had been terminated for violation of company policy. Claimant did not mark on the form that he was terminated because of absenteeism. The Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith.

Claimant's lack of credibility is a factor in this determination. Claimant repeatedly denied he could recall when or why he was terminated and yet he could specifically recall that he had called in on November 25, 1998. And claimant filled out the exit interview on which he indicated his termination was for violation of company policy. The Board concludes claimant's falsification of the reason for his absence on November 25, 1998 was a violation of the policy considerations announced in *Foulk*[6] and *Copeland*.[7] Claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foulk* or a failure to make a good faith effort to find/retain appropriate employment as described in *Copeland*. Accordingly, because claimant was terminated for misconduct, the wage he was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was at least 90 percent of his gross average weekly wage, his permanent partial general disability award is based upon his permanent functional impairment.[8]

The claimant next argues that he requested and was provided a document from respondent which indicated that his average weekly wage was $553.92.[9] Respondent's attorney did not deny the document was provided by respondent but expressed concern that it was incomplete and further indicated the document would be explained through deposition testimony. An additional document also was provided by respondent which indicated claimant's gross average weekly wage was $410.17. This document contained strikeouts and numbers inserted by hand which altered the totals on the printed

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[5] See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App.2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[9] R.H. Trans., Cl. Ex. 2.

document.[10] No additional testimony was taken to explain the calculations or where the numbers written on respondent's exhibit were obtained. The Board concludes the claimant's proffered document was provided by respondent and, absent an explanation of the handwritten insertions on respondent's proffered document, is the best evidence in this case of claimant's gross average weekly wage. Consequently, the ALJ's determination of claimant's gross average weekly wage is modified to $553.92.

Claimant further argues that his gross average weekly wage should have been calculated based upon a six-day work week. Claimant testified that he was required to be available to work on Saturdays. He further noted that if he worked on Saturday he was occasionally given a day off the following week. And there were musings in the record which indicate claimant worked 11 Saturdays during the 26 weeks before his accident.

The Board concludes that claimant's wage should be based upon a five-day work week rather than a six-day week. The Board is not unmindful that in *Tovar*[11] the Court of Appeals stated that employees being told that they are to keep Saturdays open and available for work is tantamount to a directive that they are expected to work each Saturday. But the present fact situation is arguably distinguishable from *Tovar* as claimant agreed that if he did work on a Saturday then he was occasionally given a day off the following week. Such facts would disprove that claimant had an expectation of working a six-day work week instead of a five-day work week. On the other hand, if claimant worked 11 of the Saturdays in the 26 weeks before his accident a strong argument can be made that he was expected and frequently worked a six-day work week. However, even assuming claimant had a reasonable expectation of a six-day work week, it cannot be determined from the evidentiary record how much of the overtime claimant worked was attributable to work on Saturday. The parties recognized that further testimony was necessary to verify the claimant's actual wages but no additional evidence was taken.[12] Consequently, the calculation of claimant's gross average weekly wage based upon a six-day work week cannot be accomplished. Accordingly, the claimant has failed to meet his burden of proof in this respect.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 4, 2002, is modified to reflect claimant's gross average weekly wage is $553.92 and affirmed in all other respects.

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[10] R.H. Trans., Resp. Ex. A.

[11] *Tovar v. IBP, Inc.,* 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

[12] R.H. Trans. at 28-29.

The claimant is entitled to 24.90 weeks of permanent partial compensation at the rate of $351 per week or $8,739.90 for a 6 percent permanent partial general body functional impairment which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director